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No. 80-1345

IN THE

Supreme Court of the United States

October Term, 1980

KAISER STEEL CORPORATION,

Petitioner,

vs.

JULIUS MULLINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF AMICI CURIAE, OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, OPERATING ENGINEERS JOURNEYMAN AND APPRENTICE TRAINING TRUST.

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QUESTION PRESENTED.

Whether an alleged unfair labor practice arising under Section 8(e) of the National Labor Relations Act should be entertained as a defense against enforcement of a collective bargaining agreement in a suit brought under Section 301 of the Labor-Management Relations Act.

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The written consents of the petitioner and the respondents having been filed in the Office of the Clerk, this brief of *amici curiae* is submitted on behalf of the Boards of Trustees of the Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Journeyman and Apprentice Training Trust ("Trustees" or the "Southern California Trusts").

NATURE OF THE INTEREST OF THE SOUTHERN CALIFORNIA TRUSTS IN THE PROCEEDING.

Each of the Southern California Trusts is a joint labor-management trust established by a written trust agreement

through collective bargaining between employers and a union in the building and construction industry as provided by Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended ("LMRA") [29 U.S.C. § 186(c)(5).]. The union is the International Union of Operating Engineers, Local Union No. 12 ("Local 12"). The Operating Engineers Pension Trust covers approximately 30,000 participants and receives monthly contributions from approximately 3,000 active employers located in Southern California and Southern Nevada. The remaining trusts cover comparable numbers of employers and participants. The Pension Trust receives payments from employers of about $6,000,000 per month and holds total assets of about $365,000,000 for the benefit of its participants. Employer contributions to the Operating Engineers Health & Welfare Fund currently average about $2,500,000 per month, and the Fund provides its participants medical benefits and related types of insurance through use of those amounts.

As fiduciaries within the meaning of Sections 3(21) and 401(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. §§1002(21), 1104(a)(1)], the Trustees of the Southern California Trusts enforce the obligations of employers to make payments to the Trusts as required by collective bargaining agreements between Local 12 and signatory employers. In the regular course of their duties, the Trustees often file suits under Section 301 of the LMRA [29 U.S.C. §185] against signatory employers who are believed to be delinquent in payments to the Trusts.

Specifically, the Southern California Trusts were plaintiffs in the cases of *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), and *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981) (petition for

rehearing denied and suggestion for rehearing *en banc* rejected August 5, 1981). In *Waggoner v. R. McGray, Inc.*, (*"McGray"*), the U.S. Court of Appeals for the Ninth Circuit held that district courts may not decide the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a Section 301 action, and that the district courts should decide contract issues presented in Section 301 actions without reference to unfair labor practice defenses. (607 F.2d at 1235-36.) In *McGray*, the employer seeking to raise the Section 8(e) defense had *not* filed a charge with the National Labor Relations Board ("NLRB" or "Board"). In *Waggoner v. Northwest Excavating, Inc.*, ("Northwest Excavating"), where the employer *had* filed a Section 8(e) charge which had been finally dismissed by the General Counsel of the NLRB, the Ninth Circuit again declined to entertain the Section 8(e) defense on grounds that collateral relitigation of charges dismissed by the NLRB, would be inconsistent with the policies expressed in *McGray*. (642 F.2d at 338, n. 2.)[1]

The Southern California Trusts view these decisions of the Ninth Circuit as fundamentally sound. This brief *amicus curiae* is respectfully submitted in an effort to assist the Court in preserving and developing the important national labor policies which underlie the *McGray* and *Northwest*

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[1]In addition, in *Northwest Excavating* the Ninth Circuit ruled that a state statute may not provide the basis for awarding attorney's fees to the prevailing party in a Section 301 action, that state law may not be incorporated into a federal rule permitting award of attorney's fees in Section 301 actions without violating the strict limits imposed by this Court in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and that attorney's fees may be awarded where the parties so provide in their collective bargaining agreement. (642 F.2d at 338-39.)

Excavating decisions. This brief will not address the issues concerning the antitrust laws or the award of attorney's fees raised by the petitioner.

SUMMARY OF THE ARGUMENT.

The primary jurisdiction doctrine applicable to the NLRB provides the proper context for determining whether an alleged violation of Section 8(e) may be raised as a defense in a Section 301 action. At the heart of the primary jurisdiction doctrine is the congressional design for central administration of the Act by an expert agency. Where applicable, the primary jurisdiction doctrine entirely preempts the jurisdiction of federal and state courts over conduct arguably subject to the protection or prohibition of the Act.

Section 301 provides a statutory exception to the primary jurisdiction doctrine, allowing federal and state courts to remedy a breach of contract even when the same conduct is an unfair labor practice subject to the jurisdiction of the NLRB. However, court jurisdiction under Section 301 covers only the dispute governed by the terms of the collective bargaining agreement itself, and courts should properly proceed to enforce such contract rights without regard to any alleged unfair labor practice raised as a defense.

The Act places discretion in the General Counsel of the NLRB to dismiss an unfair labor practice charge arising under Section 8 of the Act or to file a complaint and prosecute the case as government litigation before the Board. The Board is given broad discretion in interpreting and applying the unfair labor practice statutes to effectuate the policies of the Act. A private party such as Kaiser has no right or remedy under the Act unless the General Counsel of the NLRB is persuaded to issue a complaint upon a filed charge. Kaiser has no constitutional basis for complaining of this statutory design, since a private party cannot claim

a statutory right while attacking the constitutionality of the statutory design for exercise of that right.

Authorizing state and federal trial courts to litigate Section 8(e) disputes raised as defenses to enforcement of collective bargaining agreements under Section 301 would leave nothing of the Board's primary jurisdiction over Section 8(e) cases. This Court's prior decisions do not permit such a result, and expressly teach that collective bargaining agreements should be enforced in Section 301 suits even where the enforcement involves permitting conduct arguably prohibited by Section 8 of the Act.

The words of Section 8(e) do not change the scope of the Section 301 exception to the primary jurisdiction doctrine. The words "unenforceable and void" in Section 8(e) are themselves under the exclusive jurisdiction of the NLRB for purposes of interpretation and application. The words "unenforceable and void" are limitations placed by Congress upon the Board's discretion to design appropriate remedial orders in cases involving a violation of Section 8(e). The Board gives full meaning to those words in that context.

Section 303 of the LMRA 1947 provides no support for litigating Section 8(e) disputes in Section 301 actions. Congress did not amend Section 303 to authorize suits for violation of Section 8(e). Even violations of Section 8(b)(4) are made unlawful by Section 303 expressly for the purpose of that section only. This express limitation in Section 303 precludes the litigation of Section 8(b)(4) issues in Section 301 suits. Under that circumstance, Section 303 cannot infuse Section 301 with jurisdiction over Section 8(e) disputes which cannot be litigated under Section 303 itself.

Permitting Section 8(e) defenses in suits by Trustees for enforcement of employer payments to employee benefit plans would greatly increase the complexity and cost of such

suits. The informed, orderly and uniform administration of the unfair labor practice statutes has been consistently protected by the primary jurisdiction doctrine and should be maintained by holding that Section 8(e) defenses will not be entertained in Section 301 actions.

ARGUMENT.

AN ALLEGED UNFAIR LABOR PRACTICE ARISING UNDER SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT SHOULD NOT BE ENTERTAINED AS A DEFENSE TO ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT IN A SUIT BROUGHT UNDER SECTION 301.

A. The Decisions of This Court Have Carefully Protected the Primary Jurisdiction of the NLRB to Interpret and Enforce the Unfair Labor Practice Statutes.

The brief of petitioner Kaiser Steel Corporation ("Kaiser") presents an exhaustive discussion of judicial attitudes toward "illegality" as a defense to enforcement of contracts. By addressing its position in the case with such generality, Kaiser's brief never fully confronts the primary jurisdiction doctrine or the statutory scheme of the National Labor Relations Act (the "Act") and their significance to Kaiser's attempted assertion of rights under Section 8(e) in this case. In contrast, the previous decisions of this Court have carefully defined the limits of the statutory exception to the primary jurisdiction doctrine provided by Section 301.

The *McGray* decision of the Ninth Circuit presents a clear historical review of the evolution of the primary jurisdiction doctrine. (607 F.2d at 1232-35.) The primary jurisdiction doctrine as applied to the Act [29 U.S.C. §§151-169] began with the unanimous decision of this Court in *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), which provides this discussion of congressional intent:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a

> specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." 346 U.S. at 490-91, 74 S.Ct. at 166.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779-80, 3 L.Ed.2d 775 (1959), the Court held:

> "When an activity is arguably subject to Section 7 or Section 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ."[2]

Section 301 provides an express statutory exception to the primary jurisdiction doctrine. In *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962), where the conduct amounting to a breach of contract was conceded to be an unfair labor practice, this Court held:

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[2]In this brief, as in *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180, 199, 98 S.Ct. 1745, 1758, 56 L.Ed.2d 209, n. 29 (1978), the term "primary jurisdiction" refers to the *Garmon* doctrine which, where applicable, completely preempts court jurisdiction "unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act."

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." 371 U.S. at 197, 83 S.Ct. at 269.

The Court provided further guidance on the scope of the Section 301 exemption from the primary jurisdiction doctrine in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), as follows:

> "We have exempted Section 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act. The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." 403 U.S. at 300-01, 91 S.Ct. at 1925.[3]

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[3]Indeed, the reason that the primary jurisdiction doctrine may be said to have "no application to Section 301 suits" is only because the scope of the Section 301 exception to the primary jurisdiction doctrine is limited to litigation of breach of contract disputes governed by the terms of the collective bargaining agreement itself. The argument that the merits of a Section 8(e) violation may be litigated in a Section 301 suit because "the exclusive jurisdiction doctrine 'is inapplicable' to suits brought under Section 301" attempts to turn this logic inside out. *Cf.*, Kaiser's Brief, p. 42. Obviously, for the reasons stated in *Lockridge*, *McGray* and the Court of Appeals' decision in this case [*Mullins v. Kaiser Steel Corporation*, 642 F.2d 1302, 1315-16 (D.C. Cir. 1980)], the primary jurisdiction doctrine is both applicable and determinative when a party attempts improperly to litigate unfair labor practice issues in Section 301 actions.

In sum, the decisions of this Court preserve the exclusive jurisdiction of the NLRB over the investigation, prosecution and initial determination of unfair labor practices arising under Section 8 of the Act, while providing for litigation of breach of contract disputes "governed by the terms of the collective bargaining agreement itself" by the federal and state courts in Section 301 actions. *Cf., McGray*, 607 F.2d at 1235.

B. Declining to Entertain the Alleged Section 8(e) Defense in This Section 301 Action Pursuant to the Primary Jurisdiction Doctrine Would Not Deprive Kaiser of a Remedy, but Would Merely Limit Kaiser to the Administrative Forum Prescribed for Interpretation and Enforcement of the Unfair Labor Practice Statutes.

Kaiser's argument that the Section 8(e) defense should be entertained in this action arises not from the absence of a remedy as provided by the statute, but from the desire for a choice of forum. Obviously, if the actions of the respondents in pursuing their claims against Kaiser under the disputed clauses amounted to a violation of Section 8(e), Kaiser could yet file an unfair labor practice charge with the General Counsel of the NLRB. And, if the General Counsel deemed the charge meritorious, the General Counsel could issue a complaint and seek to invoke "the superior authority of the Board." *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 272, 84 S.Ct. 401, 409 (1964). If the Board and any reviewing court were to find a violation of Section 8(e) in the respondents' prosecution of this action, the Board could fashion a remedy suitable for the existing circumstances, including consideration of any judgment paid by Kaiser in this Section 301 suit.

Absent the initiation of an appropriate charge by Kaiser before the General Counsel of the NLRB, Kaiser has no claim of right or remedy under Section 8(e).

> "In those cases in which he decides that a complaint shall issue, the General Counsel [of the NLRB] becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. *The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration.*" (Emphasis added.) *NLRB v. Sears, Roebuck & Company*, 421 U.S. 132, 138-39, 95 S.Ct. 1504, 1510-11, 44 L.Ed.2d 29 (1975).

Kaiser is entitled to claim rights under the Act only according to the processes prescribed by the Act. Having failed to invoke the processes of the Board, Kaiser is not entitled to complain elsewhere of the alleged statutory violation.[4]

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[4]Kaiser's references to a claimed violation of the constitutional principle of separation of powers is frivolous. (See Kaiser's Brief, pp. 44-47.) Congress certainly is empowered to enact one statute (Section 301) granting jurisdiction to the federal courts over contract enforcement actions, while enacting another statute [Section 8(e)] reflecting a public policy whose interpretation and enforcement is restricted to the exclusive jurisdiction of a central administrative agency and appellate courts with limited powers of review. The rule is well settled that a party may not rely upon a statutorily created right and, at the same time, attack the constitutionality of other requirements and restrictions on that right contained in the same integrated statutory scheme.

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' . . .
>
> 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Fahey v. Mallonee*, 332 U.S. 245, 255, 67 S.Ct. 1552, 1557 (1947).

Kaiser cannot claim a right under Section 8(e) and then complain that Congress has required that the right be pursued and adjudicated exclusively through the processes of the NLRB.

C. Litigation of Section 8(e) Defenses in Section 301 Suits Is Not Permitted by the Congressional Design for Central Administration of the Unfair Labor Practice Statutes.

1. The Section 301 Exception.

"Centralized administration of specially designed procedures . . ." which entails "deliberately placing the responsibility for applying and developing this comprehensive legal system [the Act] in the hands of an expert administrative body rather than the federalized judicial system" is clearly at the heart of the doctrine which preempts the jurisdiction of federal and state courts over conduct arguably prohibited or protected by Section 8 of the Act. *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 285-289, 91 S.Ct. at 1917-19. And, as the Court of Appeals stated in the opinion below:

> "If an employer were allowed to interpose the Section 8(e) defense in any suit to enforce a collective bargaining agreement, there would be nothing left of the Board's primary jurisdiction for Section 8(e) cases." 642 F.2d at 1316.

Since state courts have concurrent jurisdiction of Section 301 actions [*Charles Dowd Box Company v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962)], granting Kaiser's wish to litigate Section 8(e) would place the interpretation and enforcement of perhaps the most complex of the unfair labor practice statutes within the purview of every court in this country.[5] Thus, Kaiser's contention would expand to the greatest extreme the "multiplicity of tribunals"

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[5]"This will not always be a simple test to apply. But '[h]owever difficult the task of drawing lines more nice than obvious, the statute compels the task.' " *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 645, 87 S.Ct. 1250, 1269 (1967).

which this Court has recognized as the primary threat to the statutory design enacted by Congress. *Garner v. Teamsters Union, supra,* 346 U.S. at 491, 74 S.Ct. at 166.

This Court has never found in Section 301 any expression of congressional intent to undercut the primary jurisdiction of the Board over interpretation and enforcement of the unfair labor practice statutes. To the contrary, the careful efforts of this Court in making "a fuller explication" of the *Garmon* doctrine of preemption (*Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 277, 91 S.Ct. at 1913) specifically defined the scope of the Section 301 exemption from the *Garmon* principle as "applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." *Id.*, 403 U.S. at 300-01, 91 S.Ct. at 1925. The congressional intent pertinent in this case could hardly be expressed more clearly than as follows:

> "We have exempted Section 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements *even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act.*" (Emphasis added.) *Id.*

In the context of this case, the decision of the Court of Appeals merely proceeds with enforcement of the collective bargaining agreement, "even where that process may involve . . . permitting conduct arguably subject to the . . . prohibition of [Section 8(e)]." Thus, the scope and intent of Section 301 as previously determined by this Court clearly does not provide the basis for undercutting the statutory scheme of central administration of the Act.

2. The Words of Section 8(f).

Aside from Section 301, Kaiser has identified two other statutes as potential indications of congressional intent that Section 8(e) disputes be litigated in Section 301 actions. Those two additional statutes are Section 8(e) itself and Section 303 of the LMRA [29 U.S.C. §187]. Kaiser relies most heavily on the words "unenforceable and void" which appear in Section 8(e). (Kaiser's Brief, pp. 35-41.) The most readily apparent flaw in Kaiser's reliance on the "unenforceable and void" words of Section 8(e) is that Congress placed those words within Section 8 of the Act and, thereby, within the exclusive jurisdiction of the NLRB for purposes of interpretation and enforcement. Thus, this proffered rationale for lifting Section 8(e) disputes out of central administration of the NLRB is, indeed, a "bootstrap" argument.

Kaiser seems to contend that the words "unenforceable and void" can have no meaning except to require litigation of Section 8(e) disputes by courts. In actuality, the words of the statute are given full meaning by the NLRB in fashioning appropriate remedies after determining on the merits that a Section 8(e) violation has occurred. The NLRB has broad discretion under Section 10(c) of the Act to adapt its remedies to the needs of particular situations in order to "effectuate the policies of [the] Act", but the power of the Board is limited to remedial, not punitive, affirmative orders which are to be "in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation . . ." *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655, 81 S.Ct. 875, 877 (1961). The Congress was certainly free to place additional guidelines and limits upon Board remedies for violations of Section 8(e), and did so by requiring the Board to make such unlawful agreements "unenforceable and

void." The Board regularly gives effect to the words of the statute by ordering that the charged party "cease and desist from entering into, maintaining, giving effect to, or enforcing . . ." the offending agreement. *See, e.g., International Union of Operating Engineers, Local Union No. 12 (Griffith Company)*, 243 NLRB No. 153 (1979); *appeal pending sub nom. Griffith Company v. NLRB*, Nos. 79-7394, 80-7103 (9th Cir.) This application of the words "unenforceable and void" is consistent with the remedial purpose of Congress and "fall[s] well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *NLRB v. Enterprise Association, etc., Local Union No. 638*, 429 U.S. 507, 528, 97 S.Ct. 891, 903, 51 L.Ed.2d 1 (1977).

As reflected by this long established precedent, Section 8(e) was committed by Congress to the exclusive jurisdiction of the NLRB, and nothing in the wording of the statute itself suggests that Section 8(e) is an exceptional unfair labor practice intended to be litigated in the courts.

3. Section 303.

Congress has been well aware of the distinction between placing its statutory enactments within Section 8 of the Act, and placing enactments in the broader context of the LMRA. Sections 301, 302 and 303 of the LMRA [29 U.S.C. §§185, 186, 187] reflect national labor policies outside the primary jurisdiction of the NLRB. When Section 8(e) was enacted in 1959, Congress was also amending Section 303. The 1959 amendment to Section 303 eliminated the specific wording which had been parallel to the wording of Section 8(b)(4) of the Act. The amended Section 303 specifies the prohibited activity by reference to Section 8(b)(4). Pub.L. 86-257, Title VII, §704(e), 73 Stat. 545 (Sept. 14, 1959).

Section 8(b)(4) makes the use of strikes, threats or other forms of pressure in support of a secondary boycott an unfair labor practice. *NLRB v. Enterprise Association, etc., supra,* 429 U.S. at 528-31, 97 S.Ct. at 903-05. Section 8(b)(4)(A) prohibits the use of strikes, threats or other pressure to require an employer to enter into an agreement prohibited by Section 8(e). Congress' view of this conduct was such that Section 303 was enacted outside the channels of NLRB processes to provide immediate redress for employers coming within the protection of the statute. However, the willingness of Congress to authorize court adjudication of disputes involving economic pressure condemned by Section 8(b)(4) is no indication that this exception to the primary jurisdiction of the Board is intended to be broader than specifically written by Congress.

> "[S]ection 303(a) comprehensively and with particularity 'describes and condemns specific union conduct directed to specific objectives.' " *Local 20, Teamsters v. Morton,* 377 U.S. 252, 258, 84 S.Ct. 1253, 1258 (1964).

If Congress wished, Section 303 could have been amended specifically to authorize suits to invalidate agreements prohibited by Section 8(e).[6] Instead, Section 303 makes a violation of Section 8(b)(4) unlawful "for the pur-

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[6]The Ninth Circuit has declined to read into Section 303 such an amendment which Congress declined to enact.

> "Plaintiff argues that in order to effectuate fully the Congressional purpose expressed in [Section 303], the court should read this highly specific provision as embracing [Section 8(e)] as well as [Section 8(b)(4)] within the grounds for suit in the District Court. Congress is perfectly free to broaden the scope of [Section 303] in the manner urged by plaintiff; this court is not free to do so. The court must presume that Congress, in its 1959 amendments adding Subsection [8(e)] to the NLRA, could have amended [Section 303] with equal facility, had it chosen to do so." *Atchison, Topeka and Santa Fe Railway Company v. Locals 70, 85 and 315, Teamsters,* 511 F.2d 1193, 1195 (9th Cir. 1975).

pose of this section only . . ." Such a carefully drawn limitation cannot be ignored in its implications for whether Section 303 issues may be litigated as defenses in Section 301 actions. The clear intent and effect of the language "for purpose of this section only" preclude litigation of an alleged Section 8(b)(4) violation as a defense in a Section 301 action. If Section 303 expressly prohibits litigating a Section 8(b)(4) violation as a defense in a Section 301 action, then certainly Section 303 provides no support for permitting litigation of alleged Section 8(e) violations in Section 301 suits.

Congress did not permit an alleged violation of Section 8(e) to be litigated under Section 303. Having withheld such a remedy from the provisions of Section 303, Congress would not have intended that Section 303 be used as the rationale for infusing Section 301 with the authority withheld from Section 303. Interpretation and enforcement of Section 8(e) should remain the primary jurisdiction of the Board.

D. Permitting Court Litigation of Section 8(e) Disputes Would Have a Significant, Adverse Effect Upon NLRB Administration of Section 8(e).

Little more need be said about the implications of a "multiplicity of tribunals" for the administration of Section 8(e). However, a limited review of developments to be anticipated may be useful.

The broad discretion granted to the General Counsel of the NLRB by the Congress to investigate and select the Section 8(e) disputes to be litigated before the Board would be undercut significantly. *Cf., NLRB v. Sears, Roebuck & Company, supra,* 421 U.S. at 138-39, 95 S.Ct. at 1510-11; *Pacific Southwest Airlines v. NLRB,* 611 F.2d 1309, 1311-12 (9th Cir. 1980). Private parties wishing to pursue

Section 8(e) disputes, particularly those parties with *unmeritorious* claims,[7] would present their claims to a judicial forum, thereby depriving the General Counsel of the opportunity to make an early disposition of the dispute[8] or provide the Board the opportunity to rule on the merits of the dispute.

The enforcement of Section 8(e) would be transformed from a public policy intended to be pursued by the General Counsel as "government litigation" [*see, Sinclair Refining Company v. Atkinson*, 370 U.S. 195, 221-222, 82 S.Ct. 1328, 1342 (1962), dissenting opinion later embraced as the majority view in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970)] into private litigation subject to the purposes and compromises of private parties.[9] Trial court decisions on Section 8(e) issues would undoubtedly result in appellate review. Appellate decisions on Section 8(e) issues presented by private litigants would then hold the potential for influencing or controlling the disposition of Section 8(e) issues presented by the NLRB. Even if some courts and some private counsel have the expertise and resources to develop a complete and

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[7]Apparently Kaiser is convinced that the General Counsel of the NLRB would find no merit in its charge, because Kaiser could have (and could still) put its allegations of a Section 8(e) violation in a charge filed with the General Counsel. The six month period of Section 10(b) of the Act [29 U.S.C. §160(b)] would not bar such a charge even at this late date, because the Board could find a continuing violation based upon the view that parties "have entered into the disputed clauses within the 10(b) period by their continuing reaffirmance of the enforceability of those clauses. . . ." *Bricklayers, Local 2 (Associated General Contractors)*, 224 NLRB 1021, 92 LRRM 1347, 1351 (1976).

[8]Of course, prompt determination of labor disputes is a primary goal of the Act. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707, 86 S.Ct. 1107, 1114 (1966). *U.A.W., Local 283 v. Scofield*, 382 U.S. 205, 213, 86 S.Ct. 373, 379, 15 L.Ed.2d 272 (1965).

[9]"A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *NLRB v. Industrial Union*, 391 U.S. 418, 424, 88 S.Ct. 1717, 1721 (1968).

pertinent factual record for the proper determination of Section 8(e) issues, many courts and private counsel do not. That circumstance would sacrifice completely the informed, orderly and uniform administration of the unfair labor practice statutes which has been central to the intent of Congress.

E. Permitting Litigation of Section 8(e) Disputes in Section 301 Cases Would Hamper the Enforcement of Collective Bargaining Agreements by Trustees of Employee Benefit Plans.

The additional burden and expense imposed on courts and trustees of employee benefit plans in permitting litigation of Section 8(e) issues in Section 301 cases for recovery of fringe benefit contributions would be considerable. Rule 19(a), F.R.Civ.P., apparently would require joinder of the union and any signatory employer associations in light of the potential impairment of their interests if their agreement is declared invalid in any respect. As indicated by the record in this case, Section 8(e) issues are relatively complex in comparison to breach of contract issues. Although Kaiser recites a long historical perspective of the disputed clauses in this case, the record presented appears to be merely one employer's view of industry-wide experiences and events. If this Court were to open the door to full blown litigation of Section 8(e) in the courts, counsel for unions and employer associations could be expected to contribute their efforts toward a burgeoning trial court record.

The merits of unfair labor practice issues should be left to the NLRB for determination. The policies developed in *Garner*, *Garmon* and *Lockridge* should be maintained by holding that Section 8(e) defenses will not be entertained in Section 301 actions.

CONCLUSION.

Based on the foregoing, the holding of the Court of Appeals that petitioner's alleged Section 8(e) defense will not be entertained should be affirmed.

August 31, 1981.

Respectfully submitted,

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